

2023:PHHC:150500

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CR-4328-2022(O&M)

Date of Decision: November 24, 2023

Varinder Kumar

...Petitioner

Versus

Seema Gupta and others

...Respondents

CORAM: HON'BLE MRS. JUSTICE ARCHANA PURI

Present: Mr.Gurcharan Dass, Advocate
for the petitioner.

Mr.Abhinav Gupta, Advocate
for respondent No.1.

ARCHANA PURI, J.

Challenge in the present revision petition is to the order dated 08.09.2022 passed by learned Rent Controller, vis-a-vis, dismissal of an application under Section 65 of the Indian Evidence Act, filed by the present petitioner-respondent No.1 before learned Rent Controller.

The essential facts to be noticed are as follows:-

That, initially, Maya Devi wife of Sham Lal was the owner of the suit property, on the basis of the sale deed dated 08.06.1973. She died in the year 1992, leaving behind Sukhdev Raj (son) and one daughter Sheela Devi. She was also having one son, by the name of Pawan Kumar, but he pre-deceased Maya Devi, as he died somewhere in the year 1984. In pursuance

of family settlement, effected between Sukhdev Raj and legal heirs of Pawan Kumar, the property in question fell to the exclusive share of Sukhdev Raj and he became exclusive owner of the same. Sukhdev Raj, thereafter, sold the property in question, to landlady i.e. Seema Gupta vide sale deed dated 06.01.2016.

Further, it is averred that Madan Lal, since deceased was occupying the shop in question as tenant, under the previous owner Maya Devi and thereafter, Sukhdev Raj. Madan Lal was in occupation of the property in question, on the ground floor and rent paid was Rs.150/- per month. He died several years back and left behind his widow, sons and daughters. However, present petitioner i.e. one of the sons of Madan Lal was alone in occupation of the shop in question. He used to pay rent to Sukhdev Raj from the firm M/s Kanshi Ram Madan Gopal. The rent was paid to Sukhdev Raj by one of the legal heirs of Madan Lal i.e. present petitioner Varinder Kumar (respondent No.1 before the Court below) upto 04.12.2015. However, property in question was purchased by Seema Gupta from Sukhdev Raj, on 06.01.2016.

Thereafter, Seema Gupta had filed the ejectment petition against Varinder Kumar and other legal heirs of Madan Gopal. In pursuance of notice issued, respondents made appearance and had taken the preliminary objections, thereby, disputing the maintainability of the ejectment petition. They also asserted that there is no relationship of landlord and tenant between the parties. In fact, real owner/landlord of the building, comprising the demised premises is Sukhdev Raj. He was unable

to make a ground for his own need to dispossess the tenant-respondent, who refused to increase the rent exorbitantly. Said Sukhdev Raj, in connivance with petitioner and her son Sumit, has conspired with them to make out a false ground of personal necessity to achieve the object, an illegal mere paper transaction of the sale has been made. Also, therein, it was asserted that Sukhdev Raj had entered into agreement to sell dated 19.03.2014 for the sale of the tenanted shop, in favour of respondent No.1 for the sale consideration of Rs.20 lakh, out of which, he had received an amount of Rs.5 lakh. The stipulated date for registration of the sale deed was 21.07.2014, on payment of balance consideration of Rs.15 lakh. Furthermore, it was also averred that Sukhdev Raj, later on started demanding more amount, which demand was resisted by Varinder Kumar, as a result whereof, the agreement to sell was cancelled, due to the illegal act and conduct of Sukhdev Raj, at the instigation of petitioner and her son.

In the light of such assertions, further, it was claimed that no transaction of sale of property has taken place. In fact, Sukhdev Raj, Seema Gupta and Sumit, have been joint in respective manner and the sale deed dated 06.01.2016 is a paper transaction. Sukhdev Raj continues to be landlord of the tenanted shop.

During the pendency of the rent petition, an application under Section 65 of the Indian Evidence Act, for permission to adduce secondary evidence, vis-a-vis, the agreement to sell dated 19.03.2014 as detailed aforesaid, was filed at the instance of present petitioner Varinder Kumar (respondent No.1 before learned Rent Controller). Therein also, all the

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aforesaid facts, vis-a-vis, manner of execution of agreement to sell and thereafter, cancellation of the same, was detailed therein. Also, all the allegations with regard to the sale deed in favour of Seema Gupta-present respondent No.1, was reiterated in the said application. Furthermore, it was stated that after the cancellation, the original agreement to sell was taken back by Sukhdev Raj and since then, it has been in the custody of the Seema Gupta. Moreover, it has also been asserted that signatures of seller Sukhdev Raj has been admitted by PW-2 Ishan Singla, in cross-examination dated 02.11.2021 at Mark A and B. In the light of the same, an application was filed for permission to lead secondary evidence of the agreement to sell.

In reply, respondent has resisted the claim of the petitioner.

After hearing learned counsel for the parties, the application was dismissed while observing that there is nothing on record to show that the applicant has given any notice to landlady to produce the aforesaid document in question, nor she had refused to provide the same. Also further, it was observed that secondary evidence can be permitted only after non-production of primary evidence is satisfactorily accounted for or can be filed only after notice under Section 66 is given. In these circumstances, while reaching the conclusion that the necessary ingredients of Sections 65 and 66 of the Indian Evidence Act are missing, therefore, the application was dismissed.

Feeling aggrieved, the petitioner-tenant had filed the present revision petition.

Learned counsel for the parties heard.

As regards the requirement of prior permission to produce secondary evidence, it may be noted that Chapter V of the Indian Evidence Act, 1872 provides that the party is required to produce primary evidence. However, Section 63 of the *ibid* Act, provides for and defines the secondary evidence, in the absence of primary evidence. Section 65 of the Act, deals with the circumstances, under which, the secondary evidence can be led. The distinction between the primary evidence and secondary evidence is nature of evidence. In absence of primary evidence, secondary evidence, can be examined by the Court, subject to fulfillment of requirement of Section 65 of the *ibid* Act. There is no requirement that before leading secondary evidence, prior permission of the Court is required to be obtained. No doubt, a practice has developed to seek prior permission to lead secondary evidence and then the application is allowed or dismissed by the Court, but however, qua this practice, there is no statutory provision.

In this regard, at the very outset, reference is made to the decision rendered by this Court in case *Harbans Kaur and others vs. Beant Kaur and otehrs, 2014(9) RCR (Civil) 3009*, wherein, while considering the question with regard to the reception of secondary evidence, it was held that filing of an application for reception of secondary evidence, is not contemplated as necessary procedure.

Suffice to make reference to decision rendered by the Hon'ble Supreme Court in *Dhanpat vs. Sheo Ram, 2020(2) RCR (Civil) 437*, wherein, it was held as herein given:-

“There is no requirement that an application is required to be filed in terms of Section 65(c) of the Indian Evidence Act before the secondary evidence is led. A party to the lis may choose to file an application which is required to be considered by the trial court but if any party to the suit has laid foundation of leading of secondary evidence, either in the plaint or in evidence, the secondary evidence cannot be ousted for consideration only because an application for permission to lead secondary evidence was not filed.

It shall be further apt to make reference to the decision rendered by Hon’ble Bombay High Court in ***Civil Revision Application No.82 of 2016***, titled ‘***Prasanbai Dhanraj Jain & others vs. Sunanda Madhukar Jadhav***’, decided on 10.11.2017, wherein, the practice with regard to the filing of the applications to seek permission to lead secondary evidence was depreciated and it was observed as herein given:-

*“10. This, I regret to say, is a misconception that has now attained the proportions of an epidemic, especially in the Court of Small Causes and in the civil courts. Apparently, none of these courts seems to care that there is no provision in the Code of Civil Procedure 1908 or the Evidence Act for any such application. Nobody seems to care either that there are reported decisions starting from ***Indian Overseas Bank v Triokal Textile Industries & Ors., AIR 2007 (Bom) 24 : 2006(6) Bom CR 85, of Vazifdar J*** (as he then was) directly to the contrary and saying that no such application is maintainable, desirable or even necessary.*

11. I have recently set out the law on this order and I will say so briefly once again: either secondary evidence is led or it is not led. Either the provisions of Section 65 are

met or they are not met. No permission of a Court is required to lead evidence of any kind. No judge in the subordinate judiciary to this High Court will hereafter will insist on any such application under any circumstances whatsoever. I do not think I can put it in any clearer terms than this. Any such order is wholly illegal and liable to be set aside. A copy of this order is now to be circulated to every Civil Judge in the State of Maharashtra. To clarify: in an evidence affidavit under Order 18, a witness may well say of a given document that he cannot prove it by direct evidence and then proceed to adduce the secondary evidence in compliance with Section 65 of the Evidence Act. The trial court is to consider that evidence, viz., the reason given for not leading direct evidence, and the secondary evidence led, and is to then decide whether the secondary evidence led is sufficient. That is all. There is absolutely no question of an application, whether styled as an interim application or a 'MARJI' application, for 'permission' to lead secondary evidence. The Court cannot refuse that permission, and it cannot insist on an application for any such permission.

While relying upon the aforesaid case law, it was held by this Court in case **RSA-327-1989** titled '**Madan Lal vs. Shankar and others**', decided on **01.11.2018**, while considering the order of dismissal of application to lead secondary evidence that the order under challenge cannot be sustained and the same was declared to be inoperative. Furthermore, the Civil Court was directed to decide the aspect of admissibility of the secondary evidence, while deciding the suit and also, it was observed that the plaintiff shall not be denied an opportunity to lead relevant evidence.

Further also, it was observed that the trial Court, while finally deciding the

case, will be entitled to evaluate such evidence and decide whether the plaintiff has successfully proved the existence, validity and genuineness of the agreement to sell and the receipt thereof, by way of secondary evidence.

In this backdrop, now reverting to the case in hand, no doubt, an application for additional evidence, need not be filed, but however, if so filed, the same cannot be dismissed, in the manner, as done by learned Rent Controller, vide impugned order. In the impugned order, the Court had reached the conclusion that necessary ingredients of Section 65 and 66 of the Act, to be missing, on which account, the application was dismissed, without making reference to the material coming on record. Needless to say, in the backdrop of the fact situation of the case in hand, as already observed aforesaid, the evidence, ought to come on record, with regard to agreement to sell dated 19.03.2014. However, the aspect of the admissibility of the secondary evidence, shall be considered by the Civil Court, while deciding the suit. However, the petitioner-tenant cannot be deprived of the opportunity to lead relevant evidence. But in any case, the trial Court will be at liberty to evaluate such evidence and probative value of the same, while taking into consideration about the plaintiff being successful or not, in proving the existence, validity and genuineness of the agreement to sell, by way of secondary evidence.

In the light of the aforesaid observations, the revision petition is hereby accepted and the impugned order is set aside, with a direction to learned Rent Controller, to provide appropriate opportunity to the petitioner-tenant, to lead evidence, on the document in question and to appraise the

same, on the touchstone of Sections 63 and 65 of the Indian Evidence Act, at the time of deciding the petition, while taking into consideration, the material coming forth, with regard to the existence, validity and genuineness of the said document.

November 24, 2023
Vgulati

(ARCHANA PURI)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes
Yes/No